FILED

No. 97-A-3048 97 1643 APR 7 1998

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

Eugene Phillips
Clarence Haynes — Petitioners

v.

The City of Harvey Ill
Nickolas Graves (Mayor)
Brenda Thompson (Building Comm.)
James Brooks (Police Commander)
et al RESPONDENTS

On petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Writ of Certiorari

Counsel of Record
Eugene Phillips (*pro se)*
13924 S. Michigan Ave
Riverdale, Il 60728
(708) 841-6542
and
Clarence Haynes (*pro se)*
14746 Perry Ave
South Holland, Il 60473
(708) 339-9812

Attorneys for Respondents
Timothy C. Lapp, Buikema, Hiskes,
Dillner, O'Donnell Marovich, Ltd
16231 Wausau Ave
South Holland, Il 60473
(708) 333-1234

QUESTIONS FOR THE COURT

Whether the U.S. District Court for the Northern District of Illinois, Eastern Division's Actions were in direct conflict with the United States Constitutions 14th Amendment under due process, and established legal precedent and procedures when the court dismissed the petitioners action less than 24 hours after it was filed and dismissed that same action with prejudice without allowing the petitioner the right to any hearing in open court, refused to provide specificity to it's order after the petitioner had stated that they did not understand specifically the court's order, refused or otherwise failed to acknowledge the evidence the petitioner had filed in support of their action and refused or otherwise failed to acknowledge the petitioners amended motion for injunctive relief and complaint, and refused to consider any sanctions other than there dismissal and dismissal with prejudice?

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The 14th Amendment of the Constitution of the United States under due process states in pertinent part:

That an action cannot be dismissed without granting the litigants a hearing and or considering the implementation of a lessor sanction before dismissing an action. The petitioners state that the U. S. District Court violated these statutues and precedence.

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3. U.S. v. Grosso d.c. pa 1964 225f supp 161

4. Manduuchi v. Tracey d.c. pa 1964 233f supp 423 affirmed 350f 2d 658 certiorari denied 865 ct. 390, 38 U.S. 943, 15L, ed 2nd 353

5. Ray v. U.S. Department of Justice D.C. mo. 1981, 508f supp724 affirmed 658

6. U.S. v. Haala, C.A. Okl. 1976, 532f. 201234

7. U.S. v. Ocampo D.C. NY 1980, 492f supp. 1211 affirmed 650 2d 421:,

8. Conn. v. Tarber, 1975, 345N.E.2d671, 369 Mass., 302,

9. Com. v. Stevens, Mass 1972, 283 N.E.,2d 673, State

10. Dassault, 1975, 225 N.W. 2d 558, 193 Neb, 122.

11. U.S. v. Peisner, Camd. 1962, 311f 2d94.

12. U.S. v. Callahan, Camd. 1962, 311f. 2d94

13. U.S. v. Callahan D.C. Minn 1964, 256f. Supp. 739.

14. U.S. v. Lawrence D.C. 1997 434f. Supp.441.

15. Moulden v. State Tex cr.App. 1978, 576 s.w. 2d817.

16. Spika v. Village of Lombard, 763 f.2d 282 (7th cir 1985).

17. Re Marchiando, 13f.3d 1111,1114-15 (7th Cir 1994)

18. Federated Organizations v. Mize, ca sth 1964,339 f2d 898.

19. Andes v. Versant Corp, ca 4th, 1986, 788 f2d 1033

20. Guyer v. Beard, Ca. 3d, 1990, 907 f2d 1424

21. Harris v. Callwood, Ca 6th, 1988, 844f 2d 1254

22. Velazques Rivera v. Sealand Services Inc. Ca. 1st 1990. 920 f.2d. 1072, 1076-1078.

23. Adriana International Corp v. Thoeren. Ca., 9th 1990. 913 f2d. 1406. 1413. Certorari denied. 111.s Ct 1019. 498 U.S. 1109.112L. Ed2d 1100

PETITION FOR WRIT OF CERTIORARI

Eugene Phillips and Clarence Haynes, respectfully petition for a writ of certiorari to review the judgement of the U.S. District Court for Illinois, North Eastern Division, as that judgement was made upon petitioner case #96-C6237 filed 9/26/96.

OPINIONS BELOW:

The District Court dismissed the petitioners complaint on 9/27/96 and cited as cause, the failure of the petitioners complaint to meet the minimum pleadings of the Fed. Rules Civic Pro. Rule #8, (evidence) for case #96 C 6237. The District Court dismissed this action as case #97C1385 on 6/6/97 with prejudice and cited as cause the violation of Rule #41 of the Fed. Rules of Civil Procedure. The United States Court of Appeals for the Seventh Circuit denied the petitioners motion for appeal of judgement on 10/12/97. The court cited no statute under which it made its ruling, but affirmed the ruling and opinions of the District Court.

JURISDICTION

This petition is being filed within 90 days of entry of the Issuance of order dismissing petitioners motion for rehearing on 2/9/98.

The Petitioners State:

The U.S. District Court for the Northern District of Illinois Eastern Division has jurisdiction under 28 U.S.C. Section 1331. The U.S. Court of Appeals for the Seventh Circuit has jurisdiction under 28 U.S.C. Section 1291. The 4th amendment guarantees citizens rights against unwarranted search and seizure. The 14th amendment guarantees citizens rights to due process under the law.

JURISDICTION

The petitioners state the following:

That on 7/10/96, the Harvey Police Department under Commander James Brooks and Brenda Thompson, Building Commissioner of Harvey, Illinois did arrest and seize all the vehicles and equipment belonging to Tires Unlimited and Unlimited Auto Care, the petitioners, Clarence Haynes and Eugene Phillips and vehicles belonging to their customers. The Harvey Police Department charged the petitioners with criminal trespass and operating a business without a license. These charges and actions were perpetrated without benefit of a warrant, court order of any court authorization whatsoever. The petitioners were arraigned on 8/13/96 in the Sixth District in Markham, Illinois before Judge Muse. The court exonerated the petitioners of both charges and dismissed the charges against the petitioners.

The petitioners state:

That on 9/26/96 that they brought an action against the City of Harvey, Illinois and it's Mayor Nicholas Graves, James Brooks and Brenda Thompson in the United States District Court for Norther Illinois, Eastern Division, and cited as jurisdiction the violation of the petitioners constitutional rights under the 4th and 14th amendments.

The Petitioners State:

The district court had jurisdiction under 28 U.S.C. Section 1331 and the U.S. Court of Appeals for the Seventh Circuit has jurisdiction under 28 U.S.C. section 1291. The 4th amendment guarantees citizens rights against unwarranted search and seizure. The 14th amendment guarantees citizens rights to due process under the law.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the interpretation of the following constitutional provision:

1. The fourteenth amendment to the United States Constitution under constitutional law, under due process which states in pertinent part:

> "The fundamental conception of a court of justice is condemnation only after a hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatsoever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." 17s. CT. At 843,167 U.S. at 413-414.

STATEMENT OF THE CASE

"DUE PROCESS

The petitioners filed this action in the United States District Court for the Northern District of Illinois, Eastern Division on 9/26/96. The district court dismissed petitioners complaint less than 24 hours after it was filed. This action violates due process as it pertains to the 14th amendment, and all subsequent rulings made by this court and the U.S. Court of Appeals for the Seventh Circuit have all emanated from the district courts actions which subsequently dismissed the petitioners original action with prejudice without benefit of a hearing of any type. "Hearing" being defined as follows: a rights to address a court on the merits or issues relating to a litigants right to defend or advance an interest.

The Statute: the 14th amendment under right to "due process" was designed to protect litigants rights to equal justice under the law. The courts have repeatedly stated that to deny a litigant of any opportunity to address the merits of his action before a court of law is clearly a denial of his "due process". Many courts have set in place necessary criteria to be followed before a litigant can be deprived of his right to advance an action, interest, case etc. In each instance, the court have echoed one common theme and that is that a hearing is required before any court can dismiss an action with or without prejudice.

The petitioners state:

That under the 14th amendment rights guaranteed:

1. Notice. "An elementry and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, and under all of the circumstances, to apprise interested parties to the pendency of the action and afford them an opportunity to present their objections". The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the privation of his interest. Ordinarily, service of the notice must be reasonably structured to see that the person to whom it is directed receives it.

2. Hearing. "Some form of hearing is required before an individual is finally deprived of a property, liberty, or interest."

The petitioners state:

> That on 2/9/98, the United States Court of Appeals for the Seventh Circuit denied the petitioners appeal and their "timely" motion for rehearing . The source of the district courts contention stems from the alleged failure of the petitioners complaint to meet the minimum pleading requirements of the Federal Rules of Civil Procedure Rule #8 (evidence). A contention that the petitioners didn't understand and sought clarification from the court on 10/9/96 , a contention that the court has yet to clarify even after the petitioners had motioned to appear for clarification of the courts order.

The Petitioners state:

That the District Court never entered an order dismissing petitioners case # 96 C 6237, with prejudice, though this fact has been ignored repeatley by both the Appellate and District Courts in allowing the defendants arguement that the petitioners second action under case #97 C 1385 was not timely, this contention by the defenses is without merit..

The Petitioner's state:

That they would like the records to show that the second action by the petitioners was only brought at the petitioners attorney's request. Also the petitioners would like to state that the second action was brought by the petitioners so that all party's mentioned in the first action could be represented as the Appellate Court had mad note to the petitioners, as their standing as non-attorney's prohibited their representation of the the corporations they were agents of.

STATEMENT OF FACTS

The petitioners state, that on 7/12/96 members of the Harvey Illinois Police Department under Commander James Brooks and Building Commissioner, Brenda Thompson arrested the petitioners and seized some 30 vehicles and all of the petitioner's working stock and equipment without aid of any court authorization whatsoever.

The petitioners were arraigned on 8/13/96 and acquitted of charges of criminal trespass and operating a business without a license, even though the petitioners were acquitted of all of the charges, the city of Harvey refused to release any of the petitioners vehicles of which most belonged to customers and the petitioners working stock and equipment, thus terminating the petitioners business. The petitioners brought a complaint on 9/26/96 in the U.S. District Court for the Northern District, of Illinois, Eastern Division, on behalf of Tires Unlimited Inc and Unlimited Auto Care Inc, Clarence Haynes and Eugene Phillips, who are now the petitioners.
The petitioners provided with that complaint some 21 different forms of evidence, all of which was meant to support the petitioners argument.

The Petitioners stated that on 10/4/96 they had filed a motion for injunctive relief, in hopes of having the court recover the vehicles and equipment as well as working stock, so that the petitioners could resume business, the sole purpose of that motion was to have the court review the legality of the City of Harvey's action in their seizing of the petitioners property, in hopes of having the court order the city to return the petitioners property. The petitioners also state that the Mayor of the City of Harvey, Illinois was named in the petitioners complaint because of statements made by the Mayor in the Harvey Star Newspaper in which he referred to the petitioners as "dead beats and bums" and stated "if they paid their bills they would still be in business."

The petitioners state:

That there is great cause for concern by the petitioners in regards to the integrity of the rulings handed down by both courts, as those rulings effect the petitioners action.

The petitioners state:

That their concern has been hightened by statements made by the U.S. Court of Appeals for the Seventh Circuit in it's order dismissing the petitioners appeal on 12/1/97, the statement reads in pertinent part:

"The defendants told them that they could move their care repair business onto the property" See App P. Page 16. The statement just quoted is being presented by the Appellate Court as having been made by the petitioners and is presented as fact, however in fact, this is a contention that has never been set forth in any of the documents filed by the petitioners in any court, never, the petitioners question the source of the courts statement. The petitioners state, that now it is very clear to them why the Court of Appeals **rubber stamped** the District Courts ruling, without any consideration whatsoever as to wheather or not the petitioners rights to due process could have been violated, by the District Courts dismissing the petitioners action less than 24 hours after it was filed, and dismissed with prejudice without a hearing of any type, a point that was clearly not considered by the Appellate Court, since that court ruled. See App. J, page 16. That oral arguments were not necessary even though the records clearly showed that the petitioners have never been granted a hearing of any type, in regards to this action, a fact that is a clear violation of the petitioners right to due process under the law.

The U. S. District Court dismissed the petitioners action on 6/9/97. The dismissal was with prejudice the short docket sheet will show that the court did not grant the petitioners a hearing under this action case #97 A 1385 as it also denied the petitioners any hearing what so ever under case #96C6235. See long docket sheet App. K page 21.

4/21/97 13, Minute order of 4/21/97 by Hon. Suzanne B. Conlon defendants' motion to vacate technical defaults (8-1), and for leave to file appearances and motion to dismiss or in the alternative, motion for transfer (8-21), is granted. Defendants' motion to dismiss (10-1) is taken under advisement. Plaintiffs to respond by plaintiffs to respond (10-1) by 5/12/97. Ruling by mail. Plaintiffs' motion for (entry date 4/24/97).

6/9/97 17, Minute order of 6/9/97 by Hon. Suzanne B. Conlon: defendants' motion to dismiss is granted (10-1). This action is dismissed with prejudice. Terminating case. (See reverse of minute order.) Mailed notice (ar) (Entry date 6/12/97)

DECISIONS BELOW

1. The Unites States District Court for The Northern District of Illinois, Eastern Division dismissed the petitioners action on 9/26/96 citing as cause, the failure of the petitioners complaint to meet the minimum pleading requirements of the Federal Rules of civil procedure rule #8 (evidence). The ruling was made by Judge Susan B. Conlon who also ruled to dismiss petitioners motions for clarification of the courts ruling. Rule to dismiss petitioners motion to appear for clarification of the courts ruling.

2. The United States Court of Appeals for the Seventh Circuit dismissed petitioner Eugene Phillips and plaintiffs, Tires Unlimited Inc, and Unlimited Auto Care Inc, citing as cause the lack of standing by the petitioner, Clarence Haynes to sign the appeal on their behalf, and the lack of standing of Eugene Phillips and Clarence Haynes as non-attorney's to bring an action on behalf of the corporations they represent.

3. The United States District Court for the Northern District of Illinois, Eastern Division granted a motion by the defense to remand the petitioners case #97-1385 by Judge Bucklo back to Judge Conlon. Judge Conlon granted defense's motion to dismiss petitioners action under the conditions of res judicata. The dismissal was with prejudice. The judge also cited plaintiffs alledged violation of rule 41B.

4. The Unites States Court of Appeals for the Seventh Circuit ruled to deny the petitioners motion for appeal, the ruling was made by Judges Joel M. Flaum, Kenneth F. Ripple and Diane P. Wood. This court also denied the petitioners motion for rehearing.

5. Dismissal of petitioners motion for appeal in the United States Court of Appeals for the Seventh Circuit. The court did not give a ruling on its decision, but affirmed the findings of the lower court.

6. The denial of the petitions motion for "rehearing" in the United States Court of appeals for the Seventh Circuit cause was cited by the court, as the refusal of the presiding judges to rehear the case on 2/9/98. The judges that ruled were: Joel M. Flaum, Circuit Judge, Kenneth F. Ripple, Circuit Judge, Diane P. Wood, Circuit Judge

REASON FOR GRANTING THE WRIT

Though there are many irregularities involved with case #96C6237 filed on 9/26/96 in regards to the actions taken against the petitioners by the District Court for Northern Illinois Eastern Division. However the petitioners have chosen to address the question that is before the court for the obvious reason all of the problems the petitioners have encountered in their attempts to advance this action, emanates from the District Court's order, which dismissed the petitioners action, which was filed 9/26/96 case # 96C6237, without any warning and less than 24 hours after it was filed. This action violates due process under the 14th amendment of the U.S. Constitution and established legal procedure of the U.S. Courts in regards to dismissal of actions. The courts have stated in pertinent part:

> The fundamental conception of a court of justice is condemnation only after a hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatsoever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." 17 S. Ct. At 843, 167 U.S. at 413-414.

The petitioners state, that the district court cited as cause for its action, the failure of the petitioners complaint to meet the minimal pleadings of the federal rules of civil procedure Rule #8 (evidence). The source of confusion for the petitioners in regards to the courts order arose from the fact that the petitioners have filed some 21 documents of evidence in support of their action with this complaint. See App. C1 page 5, titled "Exhibit Sheet." The petitioners state that the District Courts order failed to provide any specificity in regards to what specific criteria was required by the court to comply with the minimum requirements of that statute as stated by the District Court. The petitioners state that their

research of the statute of Fed. Rules Civ. Pr. Rule #8 general pleading, also failed to provide any specificity in regards to evidence in pertinent part that statute reads:

A. Claims for Relief

A pleading which sets forth a claim for relief, whether an original claim, counter claim, cross claim, or third party claim, shall contain:

1. A short and plain statement of the grounds upon which the courts jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it
2. A short and plain statement of the claim showing that the pleader is entitled to relief.
3. A demand for judgement for the relief of the pleader seeks relief in the alternative of several different types may be demanded.

The petitioners state, that as a result of the courts refusal to state what evidence was required to meet the minimum pleadings of the Fed. Rules Civil Proc. Rule #8 Evidence and why the evidence the petitioners filed with their complaint failed to satisfy these requirements. The petitioners addressed what they thought might be the cause of the failure of the petitioners complaints to meet the minimum pleading requirements of that statute.

The reason the petitioners titled their amended motion for Injunctive Relief, as such, instead of amended complaint, was due solely to the fact that after examining the statue, Fed. Rules, Civil Proc. Rule #8 General pleadings (note as stated earlier, there are no criteria for evidence under this statue).

The petitioners addressed the only area under this statute that they felt their complaint might not be in full compliance with the amended motion reads in pertinent part:

"Agents" Brenda Thompson, administrator of the Department of Building and Planning and Commander James Brooks, Code Enforcement/Traffic Commander for the City of Harvey Police Department. This case arises under, **Inter Alia** the U.S. Constitution, particular under the provision of the fourth and fourteenth amendments, there to and under federal law, particularly the civil rights act title 42 U.S.C. section 1983 **Jurisdiction** lies under title 28 U.S.C. section 1331 and 1367 venue is proper under 28 U.S.C. section 1391, (b).

4. That the actions brought against the plaintiffs by the City of Harvey did violate the plaintiffs **Fourth and Fourteenth Amendment Rights** as stated in the Civil Rights Act by illegally arresting plaintiffs and illegally seizing plaintiffs property.

5. That if it pleases the court plaintiffs will cite jurisdictional authority of the court in the matters brought before the court by the plaintiffs.

A. The reasonableness of a search and seizure incident to an arrest lawful under state law is determined by Federal Constitutional Standards U.S. v. Grosso D.C. pa 1964 225f.supply161 see exhibit A, page 20 paragraph #4.

B. Freedom from arbitrary arrest and detention are — among are most cherished liberties and their infringements may be redressed by damages - Apton v. Wilson 1974 506f.2d83,165 U.Ss. App. D.C. 22. See exhibit B, page 28 paragraph #3.

C. Federal rather than state standards are to be applied in determining reasonable search and seizure - Manduuchi v. Tracey D.C. pa 1964 233f. Supp423 affirmed 350 f.2d658 certiorari denied 86 s. Ct.390,382U.S.943,15L,ed2nd353 exhibit A, page 20 paragraph #3.

D. A civil cause of action for infringement of this amendment exist. Ray v. U.S. Department of Justice D.C. Mo. 1981, 508F.Supp724 affirmed 658 F.2d 608 Exhibit B, page 28 paragraph #7.

E. Probable Cause:

Standards governing probable cause in arrest are the same as in search. U.S. V. Haala,C.A.Okl1976,532F.2D1234. See also U.S. v Ocampo,D.C.ny1980,492f.Supp.1211 affirmed 650f.2D421:, Com v. Tarber, 1975,345N.E.2D671,369Mass,302, Com. V. Stevens, Mass.1972,283N.E.2D673,State Dessault,1975,225N.W.2D558,193Neb.122.

F. Standards of Probable Cause to support search without warrant is no less stringent than standard of probable cause required to support issuance of search warrant U.S. v. Peisner,CaM.D.1962,311F.2D94. See also, U.S. v. Callahan,D.C.Minn.1964,256F.Supp.739. See Exhibit C, page 25 paragraph #41. Standards applicable in determining whether there is probable cause for warrantless search is no less stringent than that required to be shown to magistrate for issuance of a search warrant. U.S. v. Lawrence, D.C.D.C.1997,434F.Supp.441. See also, Moulden v. State Tex. Cr.App.1978,576S.W.2D 817. See Exhibit C, page 25 paragraph #41:

The petitioners realize that the amendments made in their complaint are clearly jurisdictional and not evidentiary and therefore were not sure if the court would consider the amendments made by the petitioners, to be to it's satisfaction.

The petitioners state that the clear lack of specificity was the sole cause of the petitioners motion titled "Motion for Clarification of Rule #8," filed 10/4/96. See App. E Page 7, which states in pertinent part:

Now comes Tires Unlimited Inc and Unlimited Auto Care Inc, Clarence Haynes (individual and Eugene Phillips (individual) pleading:

That if it pleases the court that the specific cause of the failure of the original motion filed 9/26/96 failed to comply with the guidelines of Federal Rule #8 be specified to the plaintiffs by the court so that any necessary amendments might be made. That if it pleases the court the plaintiffs have filed an amended motion for preliminary injunctive relief on 10/3/96. That if it pleases the court that this matter might be ruled upon with the utmost urgency because there are on going damages accruing daily.

The petitioners also state:

That they are very much aware of the fact, that the success of an action or failure of same to a large degree depends solely upon the substances and integrity of the evidence a litigant files in support of that action. This is why the petitioners made no attempt to affect the evidence they had filed in support of their action. The petitioners feared to do so, without clear and explicit directions and or instructions from the court. The petitioners state that the District Court's contention that it was not required to have given more guidance or specificity to the petitioners in its order issued 10/27/96 dismissing petitioners complaint for failure to meet the minimum pleading of the Fed. Rules. C.I.V. Pro Rule #8 (evidence) which states in pertinent part see (App. G, PAGE 11).

Here, plaintiffs contend the court should have given them more guidance on how to comply with Fed. R. Civ. P. 8. However even if this court was required to give plaintiffs more guidance (a proposition for which plaintiffs provide no support).

The petitioners state:

That the contention of both the U.S. District Court for Eastern Illinois and U.S. Court of Appeals for the Seventh Circuit, that it is not the courts responsibility to provide explicit directions or instructions are further contradicted by the Court of Appeals issuance of a letter to the counsel for the defense on 7/23/97 titled "Brief/Petition deficiency notice which reads as follows:

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

Thomas F. Strubbe
Clerk

219 S. Dearborn St.
Chicago, Il 60604

Telephone
(312)435-5850
FTS 387-5350

Date: September 23, 1997

Phillips, Eugene v. City of Harvey
Appeal No. : 97-3048

Timothy C. Lapp, Esq.
Buikema, Hiskes, Dillner, O'Donnell & Marovich
16231 Wausau Avenue
South Holland, Il 60473

Dear Counsel: **Brief/Petition Deficiency Notice**

Documents that are determined by the Clerk's Office to be procedurally deficient must be corrected and returned for filing within seven days from the date of this notice. Previously set deadlines will not be automatically extended by this deficiency notice. Copies of the corrected document must be served upon all other parties. The substance of the document must not be changed; only the procedural deficiency is to be corrected. If the initial filing was untimely or if the corrected document is not returned to the Clerk's Office for filing within the seven days, a motion to file instanter must accompany it, and must also be served upon all other parties.

Today this office "Received" your brief/petition, which has been deemed deficient for filing due to the following procedural concern(s):

The appellee has not made the required statement that appellant's Docketing Statement is complete and correct.

If it is not, the appellee shall provide a complete jurisdictional summary. See Circuit Rule 28 (c).

There is no Summary of Argument. See FRAP 28 (a) (5)

The required disk was not provided with the brief. See Circuit Rule 31 (e).

A copy of this notice should accompany the corrected filing when resubmitted. The resubmission will be deemed timely if the mailing is accomplished within seven days of this notice, except that Petitions for Rehearing must be physically received in this office within that time.

Sincerely,

Thomas F. Strubbe
Clerk of the Court

By:

Fernanda Medina_____
Deputy Clerk

The petitioners state :

That there was clearly nothing improper in the courts giving clear and concise direction to the defendants, it is in keeping with the requirements of due process as stated under Notice which reads in pertinent part:

"The notice must be sufficient to enable the recipient to determine the reprievation of his interest, and what must be done to prevent it."

The petitioners cannot understand why the courts did not afford the same rights of clarification of its order to the petitioners, as it did to the defense in response to the petitioners motions for clarification of rule #8 evidence filed 9/26/96 see (App. E, Page 7) and motion to appear for clarification of rule #8 (see App. v).

The petitioners state that the District Courts contention that they the "petitioner" should have at least attempted to comply with the courts order which states in pertinent part: see (App. D, Page 6)

Plaintiffs didn't explain why they did not at least attempt to amend their complaint by the date set by the court. Accordingly, plaintiff's motion is both untimely and without merit.

This contention by the court is itself without merit for the following reasons:

The petitioners state:

That had they attempted to affect the evidence which they had filed in support of their action on 9/26/96, without clear and explicit directions from the court, the results could have been:

1. A waste of the courts resources
2. Counter productive to the petitioners case
3. Could have been illegal

The petitioners response to the courts statement that the action being brought by the petitioners at this time is not timely, is totally without merit for the following reason:

That under Rule #58 which reads in pertinent part:

" A judgement is effective" only when so set forth and when entered as provided in Rule #79(A),"
and as stated in the practitioners handbook for appeals to the United States Court of Appeals for the Seventh Circuit on page 31 it states in pertinent part:

> Failure to receive notice of entry of judgement does not toll the time for filing an appeal. Spika v. Village of Lombard, 763 F.2d 282 (7th cir. 1985). However, the District Court may reopen briefly the appeal period if it finds that a party did not receive notice of entry of a judgement or order from the clerk no party would be prejudiced. Fed.R.App p.4(A)(6). The rule establishes an outer limit of 180 days (counting from the entry of the judgement of order appealed), requiring the party to file a motion within that time or within 7days of the receipt of notice of entry, whichever is earlier. If the motion is granted, the District Court may reopen the appeal period only for 14 days from it order. ID. It is important to note that the District Court's exercise of discretion under Rule 4(A) (6) requires conditions prescribed by the rule have been satisfied. In Re Marchiando,
> 13 F.3d 1111,1114-15 (7th Cir. 1994).

The petitioners state:

That this point of law regarding the timeliness has been brought to the attention of both the District and Appellate Courts, but these courts have persisted in granting the defenses arguments that the petitioners action was not timely because of a 58 day period between the voluntary dismissal of the petitioners appeal and the filing of the current action under case #97 C 1385. The District Court dismissed the petitioners action on 9/27/96 and threatened to dismiss that action and with prejudice after 10/16/96, but did not enter an order dismissing petitioners action until 9/4/97 which was almost 1 year later.

The petitioners state:

That the 14th amaendment under due process and legal precedent in all U.S. courts have stated that an action cannot be dismissed with prejudice without a hearing. A hearing is defined as proceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact, or of law to be tried, in which witnesses are heard and evidence presented. It is a proceeding where evidence is taken to determine issue of fact and to render decision 178, 80 cal. Rptr. 761, 762. The parties proceeded against or otherwise involved have right to be heard, in much the same manner as a trial and such proceedings may terminate in final order. See E.g.5 U.S.C.A. ss556. It is also stated under the requirements of "due process" the 14th amendment hearing. "Some form of hearing is required before an individual is finally deprived of a property or (liberty) or (interest)". The petitioners state that United States Courts and including the United States Supreme Court have set criteria by which a District Court may establish guidelines before dismissing an action. "The criteria that a District Court should consider prior to imposing dismissal as a sanction " are"

1. <u>The degree of actual prejudice to the defendant"</u>

There was no prejudice to the defendant, the petitioners action was dismissed less than 24 hours after it was filed.

2. The amount of interference with the judicial process

There was none, the petitioners were never allowed to appear before the court. The District Court dismissed the petitioners action with prejudice without <u>a hearing.</u>

3. The culpability of the litigant

The petitioners attempted on 3 separate occasions to comply with the court order and the failure of the petitioners to do so was by no means a willful act. The lack of specificity in the courts order and the denial by the court of the petitioners

"motion to appear" for a hearing regarding the courts order clearly violated the petitioners right to due process.

4. Did the court warn the party in advance that dismissal of their action would likely be a sanction for none compliance?

The court did not warn he petitioners at all before dismissing their complaint less than 24 hours after it was filed. The court only warned the petitioners that failure to comply with this order by 10/16/96 would result in dismissal of the petitioners action with prejudice.

5. Efficacy of lessor sanction
No, the court never considered lessor sanctions.
Here Haus v. Reynolds G.A.10th, 1992 965F.2d 906 921.
In fashioning appropriate sanctions, district courts should consider:
1. The wilfulness or bad faith of non complying party.

The petitioners at no time displayed a lack of willingness to comply with the district courts order. The petitioners filed 2 motions for clarification of the courts order and amended motion for injunctive relief, which the petitioners thought might have been the source of the courts problem with the petitioners complaint. The petitioners state that their failure to comply with the courts order was due solely to the petitioners lack of understanding of that order and the refusal of the court to provide any specificity.

2. The amount of interference with the judicial process.

The petitioners complaint was filed 10/26/96 case #96 C 3068 could not have possibly interfered with the court judicial process, since the complaint was dismissed less than 24 hours after it was filed.

3. The disregard of earlier warnings of consequences of misconduct

The petitioners were never given any warnings prior to the courts dismissal of the petitioners action without prejudice and were only warned after it was already dismissed, that if the petitioners failed to comply with the courts order the action would be dismissed with prejudice. Velazques Rivera v. Sealand Services Inc. C.A. 1st, 1990. 920 F.2d. 1072, 1076-1078.

In the Ninth Circuit there is a 3 part analysis for whether a District Court has considered the adequacy of less drastic sanctions:

1. "Did the court explicitly discuss the feasibility of less drastic sanctions, and explain why alternative sanctions would be in appropriate?

No. The District Court did not consider any lessor sanction at any time.

2. Did the court implement alternative sanctions before ordering dismissal?

No. The District Court did not implement any other sanctions other than dismissal and dismissal with prejudice.

3. "Did the court warn the party of the possibility of dismissal before actually ordering dismissal"?

No. The District Court dismissed the petitioners action without any advance warning less than 24 hours after it was filed and only warned petitioners that the action would be dismissed with prejudice if petitioners did not comply with the courts order by 10/16/96. Adriana International Corp v. Thoeren. CA, 9th 1990. 913 F2d.1406. 1413. Certorari denied. 111S.ct.1019.498 U.S.1109.112L. ED2d 1100.

LEGAL PRECEDENCE

The petitioners state that legal precedent has clearly shown that a hearing is required before an action can be dismissed with prejudice. The courts have also stated that the willfulness of a litigant in the failure to comply with a court's order must be taken into consideration before that court can decide what sanction if any is applicable. As example, the petitioners have used the following cases to establish this point:

1. The dismissal of an action for non compliance with an order for an appearance before the court was an abuse of discretion because the plaintiffs misunderstood the order and their aabsence was not willful or in bad faith. Council of Federated Organizations vs. Mize, CA 5TH 1964, 339 F2d 898.

2. One court has said in dictum, that rule 41(A)(2) implicitly grants the district court the power to dismiss with prejudice, by so noting on the order. However, the court must give the plaintiff notice and an opportunity to litigate the merits. Andes vs. Versant Corp, CA. 4th, 1986, 788 f2d 1033.

3. Even when the plaintiff has caused delay or engaged in contumacious conduct before the district court dismisses the complaint for the plaintiffs failure to comply with the district court's order. The district court must consider whether the ends of justice would be served better by a lesser sanction. Guyer vs. Beard, CA. 3d, 1990, 907 F.2d 1424.

4. Absent notice that dismissal is contemplated. The district court should impose a penalty short of dismissal for failure to comply with a pretrial order, unless the derelict party has engaged in bad faith or contumacious conduct. Harris vs. Callwood, CA 6th, 1988, 844 F.2d 1254.

5. The district court abused it discretion in dismissing a prison inmate's civil rights complaint for failure to comply with a pretrial order requiring the filing of certain documents with the clerk of the court; the inmate did not engage in such a course of intentional delay or contumacious conduct as to warrant that drastic sanction, but had pursued the lawsuit diligently to the best of his ability and delayed only because he thought an attorney was to be appointed for him. Brown vs. Frey, CA. 8th, 1986, 806F.2d 801.

6. Any failure to disclose, regardless of the reason for it, brings the sanctions of rule 37 into play, but the reason for the failure is an important consideration in determining what sanction to impose. If the failure is because of inability to comply, rather than because of willfulness, bad faith, or any fault of the party, the action may not be dismissed, nor a default judgment given, and less severe sanctions are the most that can be involved. Although the provision of rule 37, relating to failure to comply with discovery orders applies to all failure to comply whether willful or not, presence of good faith in parties is relevant to orders which should be given and severity of sanctions. B.F. Goodrich Tire Co. Vs. V. Lyster; CA 5th, 1964, 328 F. 2d. 411.

7. Drastic sanction of dismissal should not be imposed when failure was not willful. Oaks vs. Rojcewicz, Alaska, 1966, 409 P.2d 839,843 quoting Barron and Holtzoff (Wright Ed).

The petitioners state, that the District Courts contention that the failure by the petitioners, to satisfy the Districts Courts order, was a willful act of noncompliance, is clearly contradictory for the following reasons:

The court has stated, that the petitioners were seeking guidance from the court, as to how to comply with its order, guidance of which the court stated, that it was not obligated to give, what the court is referring to, is obviously the two motions for clarification of the courts order filed by the petitioners, however, that same District Court accuses the same (plaintiffs) petitioners of making no attempt to comply with that same order. The two contentions by the court are clearly contradictory, and mutually exclusive, of one another, if one is true, then the other is false.

The records shows that the petitioners did attempt to comply with the courts order on three different occasions, however, there is absolutely no bases of fact, for the courts contention that the failure to satisfy the courts order was a willful act of noncompliance by the petitioners, what so ever. The petitioners state, that any failure to satisfy the courts order, was due solely to the fact that the petitioners did not know how to comply with that order, even though the petitioners did indeed attempt to comply with the courts order which the records show, and again the courts contentions are contradicted by the fact of the record, the court stated in its order see (App. G page, 11) that "The plaintiffs (petitioners)" do not explain why they did not at least attempt to comply with the courts order. "This statement was totally without merit."

REASON FOR GRANTING THE WRIT

The District Court dismissed the petitioners action with prejudice on 6/9/97 under Fed. R. Civ. P. 41 (B) which the court stated in pertinent part:

> A dismissal resulting from a plaintiff's failure to prosecute a case or to comply with a court order operates as an adjudication on the merits.

The Supreme Court has stated clearly that courts should be very cautious in using this statute as an automatic sanction, when litigants have failed to comply with the court's order, the court has stated, in pertinent part:

> "Establish that there are constitutional limitation upon the power of a court, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause".

The petitioners state, that the dismissal of their action without any hearing whatsoever, and absolutely no consideration of the merits of the cause that the petitioners have brought before the court, are prime examples as to why the Supreme Court issued this warning to the lower court's.

The petitioners state:

That the facts are very clear and that fact is the courts have violated the petitioners rights to due process in several areas:

1. The court did not give proper notice in it's order that dismissed the petitioners action on 9/27/96. In that order, the court stated what the defiecency was, but did not state specifically what the court required to remedy the deficiency and did not specifically state why the complaint failed to comply with the Fed. Rules, Civil. Proc. Rule #8 evidence. As is required under notice of the 14th amendment due process, notice.

2. The petitioners state that the refusal of the district court to allow the petitioners any hearing in regards to their action is a clear and blantant violation of their constitutional rights, as stated in the 14th ammendment under due process.

3. The court failed to consider any sanctions other than dismissal, this violates legal precedent, as has been shown in cases presented earlier in this document.

CONCLUSION:

The petitioners state that what is most frighting about this entire scenario is the fact that the U.S. Federal Courts both District and Appellate in the Seventh Division and Seventh Circuit have obviously placed a higher priority on purging thier respective dockets of unwanted cases than on insuring the fact that all litigants professional as well as pro se receive a fair and just opportunity to litigate the merits of the action they have brought before the courts, with equality, devoid of any bias from the courts maybe this is just wishfull thinking by the petitioners, but we are talking about the U.S. Federal court system after all, the facts are, that the petitioners have commited no acts toward the court that would warrant the depervation of their right to pursue this action to a just and fair resolution.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Tires Unlimited Inc.
Unlimited Auto Care Inc.
Clarence Haynes (Individual)
Eugene Phillips (Individual)

Plaintiff(s)

Case No. 96 C6237

V

The City of Harvey

Defendant(s)

COMPLAINT

Now comes Tires Unlimited Inc and Unlimited Auto Care Inc, Clarence Haynes (individual) and Eugene Phillips (individual) complaining of The City of Harvey Illinois that respectfully states as follows:

A. That on July 10, 1996, the Harvey Police, illegally arrested two agents of Tires Unlimited Inc and Unlimited Auto Care Inc here after referred as the "corporations" in the persons of Eugene Phillips (Individual) and Clarence Haynes (individual) and charges them with criminal trespassing under criminal codes #5/21-3 and of operating a business without a license, municipal code #720 Sec. 170. See exhibit (A)

B. That the City of Harvey Illinois thru the Harvey Police did illegally seize without any notice, verbally written or without benefit of court order, working stock tires new and used, machines and equipment. See exhibit (B)

C. That The City of Harvey Illinois did irreparable damage to the reputation and good of Tires Unlimited Inc and Unlimited Auto Care Inc. See exhibit (C)

D. That the afore mentioned actions did cause pain and suffering to Eugene Phillips (individual) and Clarence Haynes (individual). See exhibit (D)

E. That Clarence Haynes (individual) and Eugene Phillips (individual) were liable by an agent of The City of Harvey Illinois thru the statements made by the mayor of Harvey Illinois, Nickolas Graves in The Harvey Markham Star Newspaper Thursday July 18, 1996. See exhibit (E)

F. That Tires Unlimited Inc and Unlimited Auto Care Inc pray that the court would grant injunctive relief to the corporations and it's agents, Clarence Haynes and Eugene Phillips. See exhibit (F)

G. That the "corporations" and it's agents Clarence Haynes and Eugene Phillips be granted damages for the actions broughts against them by the The City of Harvey Illinois. See exhibit (G) and (H)

APP. A cont'd

Tires Unlimited Inc., Unlimited Auto Inc, Clarence Haynes and Eugene Phillips (individuals):

A. Illegal Arrest:	3.5 Million Dollars
Exhibit	
B. Illegal Seizure of Property	1.5 Million Dollars
C. Irreparable Damage to and Goodwill	10 Million Dollars
D. Pain and Suffering	1.5 Million Dollars
E. Injunctive Relief	600 Thousand Dollars
F. Liable	5 Million Dollars
G. Out of Pocket Expenditures	25,500 Dollars
H. Punitive Damages	10 Million Dollars
I. Estimated Value of Vehicles	71,222 Dollars
Grand Total	**$22,196,222.00**

App. A Cont'd

Order

MINUTE ORDER of 9/27/96 by Hon. Suzanne B. Conlon: This case is dismissed without prejudice for failure to comply with the minimal pleading requirements of Rule 8 (evidence) of the Federal Rules of Civil Procedure. Plaintiffs are granted leave to file an amended complaint by 10/16/96 or this action shall be dismissed with prejudice. terminating case Mailed notice (vj) (Entry date of 9/30/96)

EXHIBIT COVER SHEET

Exhibits

1B Motion for hostile possession

1B2 Statutes regarding injunctions

2A Building renovation contract

2A2 Property seized from building

2B Seized vehicles

2C Value of seized vehicles and extended list from ex2B

2C2 Illegal arrest criminal code #5/21-3

2C3 Judges finding in the People vs The State of Illinois
&
2C4 vs Eugene Phillips and Clarence Haynes

2D Criminal trespass to property complaint

5A Slanderous and liable statements made

App. C1

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge Suzanne B. Conlon

Case Number 96 C 6237 October 9, 1996

Case Title: Tires Unlimited, Inc, et al vs The City of Harvey
Motion:
Plaintiffs' Motion for Clarification of Rule #8
(10) [X] The motion is denied.

App C2 Suzanne B Conlon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Tires Unlimited Inc.	]	
Unlimited Auto Care Inc.	]	
Clarence Haynes (Individual)	]	
Eugene Phillips (Individual)	]	Case No. 96 C 6237
	]	
v	]	Received
	]	
The City of Harvey	]	
	]	Oct. 4, 1996
	]	

NOTICE OF MOTION TO APPEAR

Now comes Tires Unlimited Inc, Unlimited Auto Care Inc, Clarence Haynes (Individual) and Eugene Phillips (Individual) Pleading:

That is it pleases the court, Tires Unlimited Inc, Unlimited Auto Care Inc and their "agents" Clarence Haynes and Eugene Phillips will appear before the Honorable Judge Suzanne B. Conlon on Wednesday October 9, 1996 at 9:00am in room #2325, for Motion for Clarification of Rule #8 of the Federal Rules of Civil Procedure as it pertains the plaintiffs Motion for Injunctive Relief Filed on October 3, 1996 and complaint titled Tires Unlimited Inc, and Unlimited Auto care Inc, Clarence Haynes (Individual) and Eugene Phillips (Individual) v. The City of Harvey, Illinois case #96 c 6237 filed September 26, 1996.

App. D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Tires Unlimited Inc
Unlimited Auto Care Inc
Clarence Haynes (Individual)
Eugene Phillips (Individual)

RECEIVED
10/3/96
Case No. 96C6237

Plaintiffs(s)

V

The City of Harvey

Defendants(s)

Motion for Clarification of Rule #8

Now comes Tires Unlimited Inc and Unlimited Auto Care Inc, Clarence Haynes (individual) and Eugene Phillips (individual) pleading:

That if it pleases the court that the specific cause of the failure of the original motion filed 9/26/96 to comply with the guidelines of Fed. Rule #8 be sepcified to the plaintiffs by the court so that any necessary amendments might be made.

That if it pleases the court the plaintiffs have filed an amended motion for preliminary injunctive relief on 10/3/96.

That if pleases the court the plaintiffs have submitted copies of the **original complaint filed 9/26/96 and the amended motion for injunctive relief filed 10/3/96.**

That if pleases the court that this matter might be ruled upon with the utmost urgency because there are on going damages accruing daily.

ORDER

Eugene Phillips, Clarence Haynes, Tires Unlimited, and Unlimited Auto Care (collectively "plaintiffs") sue the City of Harvey, Nicholas Graves, James Brooks, and Brenda Thompson (collectively "defendants") for civil rights violations (Count 1), willful and wanton misconduct (Count 11), and slander (Count 111).

On Septbember 27, 1996, the court dismissed an almost identical lawsuit between these parties ("the September 27 order"). Tires Unlimited Inc. v. The City of Harvey, 96 C 6237 (N.D. 111. Sept. 27, 1996). The court gave plaintiffs until October 16, 1996 to amend their complaint. However, instead of amending their complaint, plaintiffs appealed the court's September 27 order. On December 18, 1996, the Seventh Circuit dismissed plaintiffs' appeal as to all plaintiffs except Haynes. On January 28, 1997, plaintiffs filed the present lawsuit before Judge Bucklo. On April 8, 1997, the case was reassigned to this court. Defendants move to dismissed the complaint on res judicata grounds.

Under federal law, the four elements of res judicata are: "(1) a final judgement on the merits in an earlier action; (2) an identity of the cause(s) of action in both the earlier and later suit; and (3) an identity of parties or privies in the two suits." Brown v. J.I. Case Co., 813 F.2d 848, 854 (7th Cir. 1987) (quoting Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982).

All three elements are present in this case. First, a dismissal resulting from a plaintiff's failure to prosecute a case or to comply with a court order operates as plaintiff's failure to prosecute a case or to comply with a court order operates as an adjudication on the merits. Fed. R. Civ. P. 41(b). Second, plaintiffs do not dispute that the present complaint raises the same causes of action as the 1996 suit. Resp. To Motion to Dism. at 1. Finally, the 1996 complaint has the same plaintiffs as the present case.

While the caption of the 1997 complaint mentions only the City of Harvey as a defendant, the complaint clearly indicates that plaintiffs sought relief for the actions of Graves, Brooks, and Thompson.

Plaintiffs respond by citing Beranek v. Postmaster General: Klassen, 511 F.2d 447 (D.C. Cir. 1975), which suggest that a pro se complaint that does not comply with Fed. R. Civ. P. 8 should not be dismissed with prejudice. While plaintiffs' original complaint was pro se, Beranek is inapplicable here for two reasons. First, the United States Court of Appeals for the District of Columbia did not publish Beranek and barred its use as precedent. Second, this court did not dismiss plaintiffs' complaint with prejudice for failing to comply with Fed. R. Civ. P. 8; rather, plaintiffs' case was dismissed with prejudice for failing to amend the complaint within the specified time period. Accordingly, res judicata applies here.

s Suzanne B. Conlon

App. F Cont'd

Trials and Hearings; Orders in Chambers.
All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

App. F3

Rule 79 (A) Fed. Rules. Civic. Proc.
Civil Docket. The clerk shall keep a book known as a "civil docket: of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts, and shall enter therein each civil action to which these rules are applicable. Actions shall be assigned consective file numbers. The file number of each action shall be noted on the folio of the docket where on the first entry of the action is made all papers filed with the clerk, all process issued and returns made thereon, all appearances, orders verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of progress. The entry of an order or judgment shall show the date the entry is made. Where in an action trial by jury has been properly demanded or ordered. The clerk shall enter the word "jury" on the folio assigned to the action.

ORDER

Eugene Phillips, Clarence Haynes, Tires Unlimited, and Unlimited Auto Care (collectively "plaintiffs") sue the City of Harvey, Nicholas Graves, James Brooks, and Brenda Thompson (collectively "defendants") for civil rights violations (Count I), willful and want on misconduct (Count II), and slander (Count III). On June 9. 1997, this court granted defendants' motion to dismiss on res judicata grounds ("the June 9 order"). Plaintiffs now move for reconsideration of the June 9 order pursuant to Fed. R. Civ. P. 60 (b).

As explained in the June 9 order, the court dismissed an almost identical lawsuit between these parties on September 27, 1996 ("the September 27 order") for failure to comply with Fed. R. Civ. P. 8. Tires Unlimited Inc. v. The City of Harvey, 96 C 6237 (N.D. Ill. Sept 27, 1996). In the September 27 order, the court gave plaintiffs, who at the time were suing *pro se*, until October 16, 1996 to amend their complaint. The court warned that the complaint would be dismissed with prejudice if it was not amended by that date. However, instead of amending their complaint, plaintiffs appealed the court's September 27 order on October 9, 1996. On December 18, 1996, the Seventh Circuit dismissed plaintiffs' appeal as to all plaintiffs except Haynes. On January 23, 1997, Haynes' appeal was voluntarily dismissed. On February 28, 1997, the case was reassigned to this court; on June 9, 1997, the case was dismissed on *res judicata* grounds.

Plaintiffs contend the June 9 order failed to consider two motions filed in 1996. Plaintiffs point to a motion filed on October 4, 1996, which sought clarification of the court's September 27 dismissal of their action. Pl. Ex. B. The motion was denied on October 9, 1996. Plaintiffs also filed a "notice of motion to appear" on October 4, 1996. Pl. Ex. C. Plaintiffs argure that the June 9 order failed to consider these

attempts at seeking guidance about the requirements of Fed. R. Civ. P. 8. Plaintiffs conclude this lack of guidance enables them to pursue a new case against defendants or to amend the complaint in their old case.

Plaintiffs' arguments are withou merit. First, this court does not have the authority to permit the new case to proceed. As explained in the June 9 order, *res judicata* applies here. The three elements of *res judicata* are: "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause (s) of action in both the earlier and later suit; and (3) and identity of parties or privies in the two suits." Brown v. J.I. Case Co., 813 F. 2d 848, 854 (7th Cir. 1987) (quoting Lee v. City of Peoria, 685 F. 2d 196, 199 (7th Cir. 1982)). A dismissal resulting from a plaintiff's failure to prosecute a case or to comply with a court order operates as an adjudication on the merits. Fed. R. Civ. P. 41 (b). Moreover, the court gave plaintiffs until October 16. 1996 to amend their complaint; when they failed to amend it by that date (or to timely seek an extension), the order dismissing the case became final. Otis v. City of Chicago, 29 F. 3d 1159, 1165, (7th Cir. 1994). Second, plaintiffs do not dispute that the present complaint raises the same causes of action as the 1996 suit. Resp. To Motion to Diam. At q 1. Finally the 1996 complaint has the same plaintiffs as the present case. While the caption of the 1996 complaint mentions only the City of Harvey as a defendant, the complaint clearly indicates that plaintiffs sought relief for the actions of Graves, Brooks, and Thompson. Plaintiffs provide no new evidence or arguments to suggest that *res judicata* is inapplicable. Thus, *res judicata* applies here, and the court has no authority to let plaintiffs to proceed with new case.

Apparently recognizing this flaw in their argument, plaintiffs seek to amend the complaint they filed in their original lawsuit. Indeed, a plaintiff may amend a complaint pursuant to Fed. R. Civ. P. 59 or 60 even after the court has

App. G Cont'd

entered final judgment and even after an appeal has been decided. Harris v. City of Auburn, 27 F. 3d 1284, 1286-87 (7th Cir. 1994); LSLJ Partnership v. Frito-Lay, Inc., 920 F. 2d 476, 478 (7th Cir 1990) (citing Standard Oil Co. Of California V. United States, 429 U. S. 17 (1976). Nonetheless, plaintiffs' motion to amend their complaint is denied for two reasons. First, a motion pursuant to Ed. R. Civ. P. 60 must be filed within a reasonable time. Plaintiffs provide no explanation for their decision to wait eights months before arguing that this court's guidance was insufficient. Thus, the motion must be denied for this reason alone.

Moreover, the usual rule that leave to amend is freely given disappears when the motion to amend is pursuant to Fed. R. Civ. P. 59 or 60. Harris, 27. 3d at 1287 (citations omitted). Thus, plaintiffs must provide "a good reason" to grant the motion. Id. Here, plaintiffs contend the court should have given them more guidance on how to comply with Fed. R. Civ. P. 8. However, even if this court was require to give plaintiffs more guidance (a proposition for which plaintiffs provide no support), plaintiffs do not explain why they did not at least attempt to amend their complaint by the date set by the court. Accordingly, plaintiffs' motion is both untimely and without merit.

Suzane B. Conlon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Tires Unlimited Inc.	]	
Unlimited Auto Care Inc.	]	Case #96 C 6237
Clarence Haynes (Individual)	]	
Eugene Phillips (Individual)	]	RECEIVED
	]	JUNE 18, 1997
Plaintiffs	]	
	]	
V	]	
	]	
	]	
The City of Harvey	]	
	]	
Defendants	]	

MOTION TO SUPPLEMENT DOCUMENT

Now comes plaintiffs Clarence Haynes and Eugene Phillips who state as follows: that on 10-4-96 the plaintiffs did file with the clerks office of The United States District Court, Northern District of Illinois, Eastern Division a document, with case number 96 C 6237 titled "**MOTION TO APPEAR**," it has come to the plaintiffs attention that this document **has not been entered** on the court docket sheet, if it pleases the court, plaintiffs pray that the court would order this over sight corrected.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 17, 1998

Hon. Joel M. Flaum, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Diane P. Wood, Circuit Judge

EUGENE C. PHILLIPS CLARENCE HAYNES Plaintiffs-Appellants,	]]]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97-3048 v.	]	
City of Harvey, et al, Defendants-Appellees,	]]	No. 97 C 1385 Suzanne Conlon, Judge.

ORDER

On consideration of the petition for rehearing filed in the above entitled case on December 12, 1997, by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

Unpublished Order not to be cited per Circuit. Ru 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 21, 1997*

Decided December 1, 1997

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

EUGENE C. PHILLIPS CLARENCE HAYNES, *Plaintiffs-appellants,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97-3048 v.	No. 97 C 1385
CITY OF HARVEY, et al, *Defendants-Appellees*	Suzanne Conlon, *Judge*

ORDER

The present action is the second action that Eugene Phillips and Clarence Haynes ("Plaintiffs") have brought

*After an examination of the briefs and record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f.).

seeking damages aginst the defendants for claims arising out of their arrest for criminal trespass to property and the seizure of cars on the property. The district court dismissed with prejudice Plaintiffs' second action on res judicata grounds, and Plaintiffs filed a motion for relief from judgment, seeking to vacate the dismissal or, in the alternative, for an order permitting the second complaint to stand as an amenden complain in their previous action. The district court denied Plaintiffs' request to vacate the dismissal of the second action and held that Plaintiffs' request to amend the complaint in the first action was untimely and without merit. Plaintiffs appeal from the district court order denying their motion for relief from judgment.

Both of Plaintiffs' actions are based on th same facts and allege the same claims.

Plaintiffs allege that their arrest for criminal trespass to property and the seizure of cars on the property was improper because the property was abandoned and the defendants had told them that they could move their car repair business onto the property. In the prior action, the district court ordered Plaintiffs to amend their complaint within a certain period, but they failed to amend the complaint and the action was dismissed. Plaintiffs immediately appealed the dismissal. This court dismissed the appeal as to all appellants except Haynes, because they failed to file a proper notice of appeal. Haynes voluntarily dismissed his appeal. Plaintiffs subsequently brought the present suit, which the district court dismissed on res judicata grounds on June 12, 1997.

On June 25, 1997, Plaintiffs brought a motion for relief from judgment pursuant fo Federal Rule of Civil Procedure 60 (b). The district court considered Plaintiffs' motion as

two separate motions: a motion to vacate the June 9, 1997 decision granting the defendants' motion to dismiss on res judicata grounds; and a motion to amend the first complaint, which was dismissed in October of 1996.

Plaintiffs' motion to vacate the June 9, 1997 dismissal of their second action properly is considered a motion pursuant to Federal Rule of Civil Procedure 59(e). This court has held that "the key factor in determining whether a 'substantive' motion is cognizable under Rule 59 or Rule 60 is its timing." *Britton v. Swift trans. Co., inc., 1997* WL 631324, *2 (7th Cir. Oct 14, 1997). A motion is cognizabe under Rule 59 if it is brought within ten days of the order from which relief is sought. Id. As computed under Federal Rule of Civil Procedure 6(a), which excludes Saturdays and Sundays from the computation of time when the period of time allowed is less than eleven days, Plaintiffs' motion was filed nine days from the entry of judgment and should be treated as a Rule 59(e) motion. Id.

The district court did not abuse its discretion in denying Plaintiffs' motion to vacate the June 9, 1997 dismissal of their second action on res judicata grounds. Id. Plaintiffs failed to produce new evidence or new arguments why the application of res judicata to their second action was improper. Instead, Plaintiffs' motion only argued that the district court erred in not considering their attempts in the first action to seek guidance on how to amend the complaint and in not permitting their second complaint to stand as an amended complaint in the first action.

Although the defendants contend that this court does not have jurisdiction to review the underlying dismissal order, as discussed above, Plaintiffs' motion properly is considered a Rule 59(e) motion. An appeal from the denial of a rule 59(e) motion is sufficient to bring the underlying judgement before

the appellate court. *Kunik v. Racine County, Wisconsin,* 106 F.3d 168, 173 (7th Cir. 1997)(citing Foman v. Davis, 371 U.S. 178, 181 (1962)).

This district court dismissed Plaintiffs' complaint on res judicata grounds. The application of res judicata requires that the following three elements be met: (1) judgment on the merits in an earlier action; (2) identity of the parties or parties in privity in the two suits; and (3) identity of the cause of action in both suits. *Brzostowski v. Laidlaw Waste Sys., Inc.* 49 F.3d 337, 338 (7th Cir. 1995). All three elements of res judicata were met. In the prior action, Plaintiffs failed to amend their complaint as ordered by the court. Federal Rule of Civil Procedure 41 (b) provides that a dismissal for failure to prosecute or to comply with a court order operates an adjudication the merits. LeBeau V. Taco Bell, Inc, 892 F.2d 605, 607 (7th Cir. 1989). Although Plaintiffs' prior complaint named only the city of Harvey as defendant and the present complaint also named three individuals, the prior complaint alleged wrongs commited by the individuals as agents of the city and sought relief for the actions of these individuals. Finally, the complaints alleged the same claims arising out of the same facts. Kratville v. Runyon, 90 F. 3d 195, 198 (7th Cir. 1996). Because all three elements of res judicata were met, the district court's dismissal of Plaintiffs' to second action on res judicata grounds was proper, and the district court did not abuse its discretion in refusing to vacate this decision.

With respect to Plaintiffs' request to permit the complaint in the second action stand as an amended complaint in the first action, the distric court treated this request as a Rule 60(b) motion to amend the complaint in the first action. The district court did not abuse it discretion in No. 97-3048

denying this request as untimely and without merit. Plaintiffs' request was made over eight months after the first action was dismissed, and they failed to provide a good reason why they should be allowed to amend the complaint in the first action after final judgment was entered. American Nat'l Ban k & Trust Co. Of Chicago v. Regional Transp. Auth, 124 F. 3d 420, 429 (7th Cir. 1997); Harris v. City of Auburn, 27 F.3d 1284, 1287 (7th Cir. 1994). Plaintiffs had the opportunity to amend their complaint in the first action and failed to do so or offer any reason for this failure.

For the foregoing reason, we AFFIRM the dismissal of Plaintiffs' complaint and the denial of Plaintiffs' motion for relief from judgment.

Proceedings include all events. TERMED
1:96cv6237 Tires Unlimited Inc, et al v Cty of Harvey, et al
DENLOW

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U.S. District Court
Northern District of Illinois (Chicago)

CIVIL DOCKET FOR CASE #: 96-CV-6237
Filed: 9/26/96

Tires Unlimited Inc, et al v. Cty of Harvey, et al
Assigned to: Hon. Suzanne B. Conlon
Demand: $9,999,000 Nature of Suit: 320
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:1331 Federal Question

9/26/96	1	COMPLAINT - Civil cover sheet - Appearance(s) of Clarence Haynes, appearing pro se (1 summons (es) issued.) (Documents: 1-1 through 1-3) (pw) [Entry date 9/27/96]
9/26/96	-	RECEIPT regarding payment of filing fee paid; on 9/26/96 in the amount of $120.00, receipt #480777. (Pw) [Entry date 9/27/96]
9/26/96	2	RETURN OF SERVICE of summons executed upon defendant Harvey, Cty of on 9/26/96. (Vj) [Entry date 9/30/96]
9/27/96	3	MINUTE ORDER of 9/27/96 by Hon. Suzanne B. Conlon: This case is

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dismissed without prejudice for failure to comply with the minimal pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Plaintiffs are granted leave to file an amended complaint by 10/16/96 or this action shall be dismissed with prejudice. Terminating case Mailed notice (vj) [Entry date 9/30/96]

9/27/96	5	MOTION by plaintiff Eugene Phillips for preliminary injunction relief. (vj) [Entery date 10/8/96]
10/2/96	6	MINUTE ORDER of 10/2/96 by Hon. Suzanne B. Conlon: Plaintiffs' motions for preliminary injunction [4-1], [5-1] are moot. Maialed notice (vj) [Entry date 10/8/96]
10/3/96	4	MOTION by plaintiffs Tires Unlimited Inc, Unlimited Auto Care for preliminary injunction (Exhibits). (vj) [Entry date 10/7/96]
10/4/96	--	MOTION by plaintiff (attachments); Notice of motion. (vj) [Entry date 10/10/96]
10/4/96	10	MOTION by plaintiff Clarence Haynes for clarification of Rule #8 (Attachments); Notice of motion (vj) [Entry date 10/10/96]

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10/9/96	7	EMERGENCY NOTICE OF APPEAL by plaintiffs Tires Unlimited Inc, Unlimited Auto Care, Clarence Haynes, and Eugene Phillips from motion minute order (6-1), from Scheduling order termination case (3-1) and from motion minute order [3-2] (Attachments) (NO FEE PAID) (PP) [Entry date 10/10/96] [Edit date 10/10/96]
10/9/96	8	LETTER regarding docketing statement acknowleged by plaintiffs Tires Unlimited Inc, Unlimited Auto Care, Clarence Haynes and Eugene Phillips - (pp) [Entry date 10/10/96]
10/9/96	11	MINUTE ORDER of 10/9/96 by Hon. Suzanne b. Conlon: Plaintiffs' motion for clarification of Rule #8 {10-1] is denied. Mailed notice (vj) [Entry date 10/10/96]
10/10/96	--	TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel. (pp)
10/10/96	9	RECEIPT NO. 481473 notice of appeal paid in the amount of $105.00 on 10/10/96 (hp)
10/11/96	12	ATTORNEY APPEARANCE for defendant by Timothy Charles Lapp, John A. Hiskes. (Vj) [Entry date 10/16/96]

10/11/96	13	RULE 39 Affidavit of Timothy Charles Lapp. (vj) [Entry date 10/16/96]
10/11/96	16	MOTION by defendant to dismiss; Notice of motion. (vj) [Entry date 10/23/96]
10/15/96	14	RULE 39 Affidavit of John A. Hiskes. (vj) [Entry date 10/17/96]
10/15/96	15	ACKNOWLEDGEMENT of receipt of short record on appeal USCA 96-3532 (Attachment) - (vj) [Entry date 10/17/96]
10/22/96	--	TRANSMITTED to the 7th Circuit the long record on appeal no. 96 -3532 consisting of letter, certificate and one volume of pleadings. Mailed notice to all counsel. (cmf)
10/22/96	17	MINUTE ORDER of 10/22/96 by Hon. Suzanne B. Conlon: Defendant'f motion to dismiss [16-1] is moot. See order of 9/27/96. Mailed notice (vj) [Entry date 10/23/96]
11/25/96	18	ORDER from the 7th Circuit (96-3532) It is ordered that appellee file, on or before 11/26/96, a response to appellant's memorandum, addressing the jurisdictional issue raised in the court's order of 10/15/96. (vj) [Entry date 12/03/96]

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12/20/96	19	CERTIFIED COPY of order from the 7th Circuit: Dismissing the appeal [7-1] (96-3532) (vj) [Entry date 1/7/97]
1/30/97	20	CERTIFIED COPY of order from the 7th Circuit: Dismissing the appeal [7-1]. (96-3532) (vj) [Entry date 1/31/97)

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IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois - Eastern Division

PHILLIPS, et al	)	
Plaintiffs,	)	
vs.	)	No. 97 C 1385
	)	JUDGE CONLON
CITY OF HARVEY, et al	)	

RECEIVED JUN 25, 1997
Michael W. Dobbins
Clerk, U.S. District Court

MOTION FOR RELIEF FROM JUDGMENT
OR ORDER

NOW COME Plaintiffs, CLARENCE HAYNES, EUGENE PHILLIPS, et al by and throught their attorney, JAMES W. NEWTON, and in support of their Fedl. R. Civ. P. 60 (b) Motion for Relief from Judgment or Order, allege as follows:

1. The Court's order of June 9, 1997 granting Defendants' Motion to Dismiss, is a judgment as defined in Fed. R. Civ. P. 54 (a).

2. Said Order states in part as follows:

> "The Court gave Plaintiffs until October 16, 1996 to amend their Complaint. However, instead of amending their Complaint, Plaintiffs appealed the Court's September 27 Order."

Plaintiffs seek relief from said Order because in issuing the Order, the Court apparently failed to consider certain proceedings which were contained in the Civil Docket for Case No. 96 CV 6237. (Copy of the

Docket attached hereto as Plaintiffs Group Exhibit (A)

3. Specifically, Plaintiffs refer to two Motions filed on 10-4-96. The first is entitled "Motion for Clarification of Rule 8" (Plaintiffs Exhibit B attached); and the second, entitled "Notice of Motion to Appear" (Plaintiffs Exhibit C attached) was also filed 10/4/96 but was not properly entered on the Court's docket sheet, and consequently, the Court may not have had that Motion available for consideration before entering its ruling herin. When Plaintiff subsequently discovered this clerical mistake, they filed a Motion to Supplement Document to correct the Court docket. (See Group Exhibit D attached).

4. It is clear from examining the two Motions filed on 10-4-96 that Plaintiffs were seeking specificity and guidance from the Court so that any necessary amendments to the Complaint could be made in compliance with the Court's 10-20-97 Order.

5. It was only after Plaintiffs' Motion for Clarification of Rule 8 was denied, and no response was made by the Court to Plaintiffs' Motion to Appear before Judge Conlon for clarification of Rule 8 (see Exhibit C), that Plaintiffs, not knowing how the Court wanted the Complaint amended, and aware of the Court's 101-16-96 deadline to amend, filed their Emergency Notice of Appeal on 10/9/96.

6. In Brown v. Frey 806 F 2d, 801 (8th Cir., 1986), the Court stated:

> "We believe that, in this case, the District Court abused its discretion in dismissing Appellant's Complaint for failure to comply with the Pre Trial Order. Pro Se litigants are not excused from compliance from substantive and procedural law,

Burgs v. Sissel, 745 F, 2dm 526 (8th Cir. 1984), but here Appellant did not engage in such a course of intentional delay or contumacious conduct as to warrant the drastic sanction of dismissal with prejudice... This case is quite different from Burgs v. Sissel (supra), where the Plaintiff had sought numberous delays over a two year period, had been given repeated opportunities to comply with a Pre Trial Order, and had been warned about the consequences of non-compliance. 745 F 2d at 527-528."

"Dismissal with Prejudice under Fed. R. Civ. P. 41 (b) is a drastic sanction which should be ecercised sparingly". Pardee v. Stock 712 F 2d 1290 (8th Cir. 1983), "because the effect of such an Order is to forever deny a Plaintiff access to the Courts for the impartial resolution of potentially meritorious claims. "Darms v. Mccullough Oil Corp. 720 F 2d 490 (8th Cir 1983).

"Before resortin to such a dismissal, the trial Judge should consider alternative sanctions which do not impact so decisively upon the litigant". Moore v. St. Louis Music Supply Co., 539 F 2d 1191 (8th Cir. 1976).

Here, in its response to Defendants' Motion to Dismiss 97 C 1385. Plaintiff sought the alternative relief of asking the Court to allow the new Complaiant to serve as an amendeed Complaint in 96 CV 6237.

"The Court should resort to the dismissal of an action only when there has been a clear record of delay or contumacious conduct by the Plaintiff". M.S. v Wermers, 557 f 2d 170 (8th Cir. 1976).

The Plaintiffs here did attempt, by two timely filed Motions, to communicate with the Court in an attempt to comply with the Court's Order to amend the Complaint. This is far from willful and contumacious conduct or bad faith as compared to Agnew v. Moody 330 f 2d 868 (9th Cir. 1964) where the Court's Dismissal Order was ruled proper when two and on half months passed beyond the 20 days allowed by the Court's Order before Plaintiffs made any effort to comply.

WHEREFORE, Plaintiffs request that this Court vacate the June 9, 1997 Order granting Defendants' Motion to Dismiss, or in the alternative, to enter an Order allowing the Complaint in 97 C 1385 to stand as the amended Complaiant in 96 C 6237, and for such other relief as this Court deems just and equitable.

Respectfully submitted,

JAMES W. NEWTON

JAMES W. NEWTON #02047268
ATTORNEY AT LAW
7667 W. 95th ST., #202
HICKORY HILLS, IL 60457
708/430-4880